82-176

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No. ...

IN THE

Supreme Court of the United States

October Term, 1982

AMADA ENTERPRISES, dba VIEW HEIGHTS CONVALESCENT HOSPITAL, *et al.*,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Question Presented.

Whether this Court's rule in *NLRB v. Savair Manufacturing Co.* (414 U.S. 270 (1973)), has been emasculated by the Ninth Circuit's holding that a waiver of initiation fees which appears only on the face of the union's authorization cards was effective both before and after an NLRB election, even though there would have been no valid purpose in the union distributing or employees signing such a card after an election.

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vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The Petitioners Amada Enterprises, dba View Heights Convalescent Hospital, B & E Convalescent Centers, Inc. and Convalescent Employers Service, Inc., dba Gardena Convalescent Center, and Cheviot Garden Convalescent Hospital, Inc., dba Cheviot Garden Convalescent Hospital respectfully pray that a Writ of Certiorari issued to review the judgments and opinions of the United States Court of Appeals for the Ninth Circuit entered in *NLRB v. Amada Enterprises, et al.* on June 14, 1982.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Ninth Circuit is set forth below in Appendix "A" and has not yet been officially reported. The Decision and Order of the National Labor Relations Board ("NLRB") in *Amada Enterprises, dba View Heights Convalescent Hospital* is set forth in

Appendix "C" and is reported at 255 NLRB No. 13. The NLRB's Decision and Order in *B & E Convalescent Centers, Inc.* and *Convalescent Employers Service, Inc., dba Gardena Convalescent Centers* is set forth in Appendix "D" and is reported at 257 NLRB No. 25. The NLRB's Decision and Order in *Cheviot Garden Convalescent Hospital, Inc., dba Cheviot Garden Convalescent Hospital*, is set forth at Appendix "E" and is reported at 258 NLRB No. 177.

JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 14, 1982. This Petition for a Writ of Certiorari was filed within 90 days of such entry. The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Sections 8(a)(1), 8(a)(5) and 9(c)(3) of the National Labor Relations Act (29 U.S.C. §158 *et seq.*) are set forth as Appendix "G" hereto.

STATEMENT OF THE CASE.

A. NLRB v. Amada Enterprises.

1. The NLRB Bargaining Order.

Pursuant to a petition filed by the union on December 31, 1979, a representation election was conducted at View Heights Convalescent Hospital on February 26, 1980. A majority of votes cast were for the union. The employer objected to the election. Upon review of the report of the Regional Director of the NLRB overruling Petitioner's objection to the election the NLRB adopted the Regional Director's findings and recommendations and certified the union as the exclusive bargaining representative for all of Petitioner's employees, excluding professional employees,

Registered Nurses, guards and supervisors. Thereafter, to obtain judicial review of its objections, Petitioner refused to bargain with the union. On March 19, 1982 the NLRB found that Petitioner's refusal to bargain violated Sections 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. Section 158, *et seq.*; "the Act"), ordered Petitioner to bargain with the union and sought enforcement of its order in the Court of Appeals for the Ninth Circuit. On motion of the NLRB, its petition was consolidated with its petitions in the matters of B & E Convalescent Centers, Inc. and Cheviot Garden Hospital, Inc. and, over Petitioners' objections, was submitted for decision without oral argument.

On June 14, 1982, the Court of Appeals issued a two-page memorandum decision enforcing the NLRB's order. At Petitioner's request, the Court stayed its mandate to permit the filing of this petition. Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, the Ninth Circuit has indicated that it will continue the stay in effect until this Court has ruled on the instant petition. A copy of the court's stay of its mandate is set forth in Appendix "B".

2. Statement of Facts.

Petitioner operates a convalescent hospital. In order to obtain support sufficient to justify the holding of an election, the union distributed authorization cards among Petitioner's employees and asked the employees to sign and return the cards.

The authorization card, which is set forth at Appendix "F", is actually a postage-free envelope. Printed on the inside of the envelope's enlarged cover flap are various campaign statements and instructions to employees on how to complete and return the card. Included in the instructions is the statement "you will not be charged any initiation

fee." The bottom portion of the envelope contains a printed statement of authorization, a signature space and an information form to be completed by the employee. The Union's offer of waiver of initiation fees is unexplained on the card.

B. NLRB v. B & E Convalescent Centers, Inc. and Convalescent Employers Service, Inc., dba Gardena Convalescent Centers.

The underlying facts and the manner in which this case proceeded to the Ninth Circuit for review are substantially identical to the facts in the case of Petitioner Amada Enterprises described in Sections A 1. and 2. above.

The NLRB adopted the Regional Director's December 11, 1980 Report overruling Petitioner's objections to the election and found Petitioner's subsequent refusal to bargain to be in violation of Sections 8(a)(5) and (1) of the Act. The NLRB sought enforcement of its July 27, 1981 bargaining order in the Court of Appeals for the Ninth Circuit.

C. NLRB v. Cheviot Garden Hospital, Inc., dba Cheviot Garden Convalescent Hospital.

The underlying facts in this case are also substantially identical to those in the case of Petitioner Amada Enterprises described in Sections A 1. and 2. above.

The NLRB adopted the Regional Director's January 9, 1981 report overruling Petitioner's objections to the election and found Petitioner's subsequent refusal to bargain to be in violation of Sections 8(a)(5) and (1) of the Act. The NLRB sought enforcement of its September 30, 1981 Bargaining Order in the Court of Appeals for the Ninth Circuit.

REASON FOR GRANTING THE WRIT.

The holding of the Ninth Circuit is in conflict with the decision of this Court in *NLRB v. Savair Manufacturing Co.* and also is in conflict with the application of the *Savair* rule by other circuits.

Petitioners argued before the Ninth Circuit that the union, by offering to waive its initiation fee by placing a waiver on its authorization cards, created a clear impression among employees that such offer could be accepted only by signing and returning the card before the election. The Ninth Circuit rejected this argument "[b]ecause the waiver unambiguously contains no reference to a pre-election time limit." (Appendix A, p. 2), and enforced the NLRB's bargaining order.

The impact of the Ninth Circuit's holding is that a union may distribute authorization cards to unrepresented employees during an election campaign and include on that card an offer to waive initiation fees, provided the card does not contain language which informs employees that the offer is effective only during the pre-election period.

The Ninth Circuit has decided this case by application of a rule which contravenes and severely limits in this circuit the rule announced by this Court in *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973). By sanctioning the use of authorization cards which state only that fees will be waived, and by refusing to scrutinize the use of such cards so long as they do not contain language limiting the availability of the waiver to the pre-election period, the Ninth Circuit gives unions carte blanche to engage in the kind of campaign excesses which this Court held in *Savair* would impair employee free choice and paint a false picture of union support.

This Court's holding in *Savair* is grounded on the well-established principle that the procedures by which a collective bargaining representative is selected must be free of influences which will limit an employee's right to choose freely between representation and non-representation, or between competing unions. *General Shoe Corp.*, 77 NLRB 124, 21 LRRM 1337 (1948). In the same manner that employers cannot purchase or coerce employee support during an election campaign by unilaterally increasing fringe benefits, see *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 11 L.Ed.2d 435, 84 S.Ct. 457 (1964), this Court held in *Savair* that a union could not limit its offer to waive initiation fees to only those employees who sign authorization cards prior to an election:

> "By permitting the union to offer to waive an initiation fee for those employees signing a recognition slip prior to the election, the Board allows the union to buy endorsements and paint a false portrait of employee support during its election campaign. . . .
>
> [W]hile it is correct that the employee who signs a recognition slip is not legally bound to vote for the union and has not promised to do so in any formal sense, certainly there may be some employees who would feel obliged to carry through on their stated intention to support the union. . . .
>
> Any procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice." 414 U.S. 277-78.

As the decision in *Savair* recognizes, a pre-election fee waiver offer is particularly troublesome because of the potential dual function served by union authorization cards. Such cards not only demonstrate union support, but, if gath-

ered in sufficient number, may also authorize collective bargaining without an election.

> "When the dissent says that '[t]he special inducement is to sign the card, not to vote for the union' and that treating the two choices as one is untenable, it overlooks cases like *NLRB v. Gissel Packing Co.* 395 US 575, 23 L Ed 2d 547, 89 S Ct 1918. There we held that the gathering of authorization cards from a majority of the employees in the bargaining unit may entitle the union to represent the employees for collective, bargaining purposes, even though there has been and will be no election, id., at 582-583, 23 L Ed 2d 547, and that rejection of that authorization by the employer is an unfair labor practice. Where the solicitation of cards is represented as being solely for the purpose of obtaining an election, a contrary result is indicated. Id., at 584, 606, 23 L Ed 2d 547. Thus the solicitation of authorization cards may serve one of two ends. Of course, when an election is contemplated, an employee does not become a member of the union merely by signing a card. But prior to the election if the union receives overwhelming support, the pro-union group may decide to treat the union authorization cards as authorizing it to conduct collective bargaining without an election. The latent potential of that alternative use of authorization cards cautions us to treat the solicitation of authorization cards in exchange for consideration of fringe benefits granted by the union as a separate step protected by the same kind of moral standard that governs elections themselves." 414 U.S. 279-280. See also, *NLRB v. Con-Pac, Inc.*, 509 F.2d 270, 272 (5th Cir. 1975).

In the instant case, the union's authorization card contained the following statement:

> "I authorize the Hospital and Service Employees Union, Local 399, AFL-CIO to represent me for pur-

> poses of collective bargaining with my employer, *and the Union may request recognition and bargain on my behalf with my employer on wages, fringe benefits and working conditions.*" (Emphasis added.)

Thus, the union, when it receives cards from employees, is authorized to seek recognition immediately. Therefore, the latent potential for avoiding an election entirely and the resulting need to scrutinize the use of the card are clearly present in this case.

Where, as here, the waiver of initiation fees is printed directly on the face of the card, it stands to reason that such a case deserves even closer scrutiny than cases in which the waiver was offered orally contemporaneous with the distribution of the card, see *e.g., Fort Smith Outerwear, Inc. v. NLRB*, 499 F.2d 223 (8th Cir. 1974), or where the offer was made either before or after the card was distributed, see *e.g., NLRB v. Aladdin Hotel Corp.*, 584 F.2d 891 (9th Cir. 1978) and *NLRB v. S & S Product Engineering Services, Inc.*, 513 F.2d 1311 (6th Cir. 1975).

Instead, the Ninth Circuit has gone to the opposite extreme. Rather than recognizing the dangers inherent in placing an unexplained fee waiver on a document which, if signed without being understood completely, could paint a false picture of support and further could compel bargaining without an election, the court instead establishes a virtual presumption of propriety. Moreover, the decision suggests that this presumption can be overcome only if the union confesses to a violation of *Savair* by expressly limiting the availability of the waiver to the pre-election period.

This decision eviscerates *Savair*. Hereafter in this circuit, unions can artificially inflate pre-election support by placing a fee waiver offer directly on their authorization card and then "unambiguously omitting" reference to the pre-election limitation.

Moreover, the Ninth Circuit's decision in this case conflicts with decisions in other circuits. Thus, in the absence of any evidence offering a timely explanation of the waiver's terms, the court presumed that the waiver was not limited to the pre-election period. Although other circuit courts, citing dictum from the *Savair* decision, have held that waiver offers which are unlimited as to time are permissible, see *e.g., NLRB v. Whitney Museum of American Art*, 636 F.2d 19, 21 (2d Cir. 1980), and *NLRB v. Con-Pac, Inc., supra*, cases sustaining a union's pre-election conduct against an alleged *Savair* violation are generally based on a record which clearly supports the union's claim that its waiver offer was not conditioned on pre-election support. See *e.g., Solon Manufacturing Co. v. NLRB*, 544 F.2d 1108 (1st Cir. 1976) ("no initiation fee for charter members"); *NLRB v. Whitney Museum of Art, supra; NLRB v. Con-Pac, Inc., supra; NLRB v. S & S Product Engineering Services, Inc.*, 513 F.2d 1311 (6th Cir. 1975); *Certain-Teed Products Corp. v. NLRB*, 562 F.2d 500 (7th Cir. 1977) (Union pamphlet stating that fee will be waived for a "certain period of time after the election"); and *NLRB v. Wabash Transformer Corp.*, 509 F.2d 647 (8th Cir. 1975).

Although the Ninth Circuit found the terms of the union's waiver offer to be acceptable and unambiguous, it nevertheless stated in *dictum*:

> "Even if the offer was ambiguous, reasonable interpretation would not suggest that the waiver was conditioned upon pre-election support" (Appendix A, p. 2).

By concluding that an employee cannot reasonably interpret an unexplained waiver offer appearing on an authorization card as being available only to employees who return the card prior to the election, the Ninth Circuit ignores the fact that regardless of their objective, authorization cards serve

only a pre-election function. They have no use, and, therefore, are unavailable as a means of obtaining a fee waiver after an election.

If a sufficient number of cards are collected, the union can demand to bargain without an election. Thereafter, if recognition is granted, it need not collect additional cards since it has already achieved representative status. If an election is held and the union wins, it will be certified as the bargaining representative on the basis of the election results. Again, further solicitation of authorization cards is unnecessary. Finally, if an election is held and the union loses, Section 9(c)(3) of the Act would operate to prohibit another election for at least 12 months, and initiation fees are a moot issue.

Thus, under each of the possible outcomes of an election campaign, there is no likelihood that a union would continue to distribute or solicit authorization cards after the election. This fact would be easily understood by employees who receive cards similar to the Union's herein. Confronted with such a card, it is also clear that the employee would conclude that in order to be eligible for the fee waiver, he or she must sign and return the card immediately, or at least before the card is rendered superfluous by the election process.

By application of a rule that is clearly inconsistent with the decisions of this Court and of other circuits, the Ninth Circuit has sanctioned pre-election conduct that violates the *Savair* rule.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Amada Enterprises, et al.

APPENDIX A

Memorandum.

United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. Amada Enterprises, d/b/a View Heights Convalescent Hospital, Respondent. No. 81-7378.

National Labor Relations Board, Petitioner, vs. B & E Convalescent Centers, Inc. and Convalescent Employers Service, Inc. d/b/a Gardena Convalescent Centers, Respondent. No. 81-7747.

National Labor Relations Board, Petitioner, vs. Cheviot Garden Convalescent Hospital, Inc. d/b/a Cheviot Garden Convalescent Hospital, Respondent. No. 82-7074.

Filed June 14, 1982.

On Application for Enforcement of an Order of the National Labor Relations Board Submitted March 30, 1982.*

Before: TRASK, FLETCHER and REINHARDT, Circuit Judges.

The National Labor Relations Board (Board) has applied for enforcement of its order in each of the three consolidated cases directing that the employer bargain with Hospital and Service Employees International Union, Local 399 (Union).

The several respondents contend that the election certification was invalid because the Union violated the rule of *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973), by improperly limiting its initiation fee waiver to those employees who signed authorization cards before the elec-

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*The panel finds this case appropriate for submission without argument pursuant to 28 U.S.C.A. Ninth Circuit Rule 3(a) and Fed. R. App. P. 34(b).

tion.[1] We find respondents' argument is without merit because the waiver unambiguously contains no reference to a pre-election time limit. *See NLRB v. Aaron Brothers Corp.*, 563 F.2d 409, 413 (9th Cir. 1977). Even if the offer was ambiguous, reasonable interpretation would not suggest that the waiver was conditioned upon pre-election support. *See NLRB v. Masonic Homes*, 624 F.2d 88, 90 (9th Cir. 1980); *NLRB v. Aladdin Hotel Corp.*, 584 F.2d 891, 892 (9th Cir. 1978). We find that the waiver was proper under *Savair* and that the Board's application for enforcement should be granted.

To obtain judicial review of the Union's waiver language, the respondents refused to bargain with the Union after the election. The General Counsel issued a complaint based upon the Union's unfair labor practice charge. The Board granted the General Counsel's motion for summary judgment finding that each respondent had violated §§ 8(a)(5) and (1) of the act when it refused to bargain. This appeal was then taken.

The Board's order is enforced.

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[1]The Union's authorization cards began with an offer of improved working conditions followed by the disputed waiver of initiation fees:

> Fill out and sign the authorization card printed below. Drop it in the mail. No postage necessary. This card is strictly confidential, and your employer will not know that you have signed. *You will not be charged any initiation fee.*

Brief for Petitioner at 4.

APPENDIX B

Order on Motion for Stay of Mandate. (Rule 41(b) Fed.R.App.P.).

United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. Amada Enterprises dba Veiw Heights Convalescent Hospital, B & E Convalescent Centers, Inc. and Convalescent Employers Service Inc. dba Gardena Convalescent Centers, Cheviot Garden Convalescent Hospital, Inc. dba Cheviot Garden Convalescent Hospital, Respondents. No. 81-7378) 81-7747) 82-7074) NLRB No. 21-CA-19373) 31-CA-10915) 31-CA-11196)

Filed July 12, 1982.

Upon due consideration of respondents motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before July 30, 1982.

IT IS ORDERED that the motion for stay of mandate be, and the same is hereby granted.*

/s/ Ozell M. Trask

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*In the event that the motion for stay of mandate and the petition for writ of certiorari are granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.

APPENDIX C

Decision and Order.

United States of America Before the National Labor Relations Board.

Amada Enterprises, d/b/a View Heights Convalescent Hospital, and Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO. Case 21-CA-19373.

255 NLRB No. 13.

Upon a charge filed on August 4, 1980, by Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO, herein called the Union, and duly served on Amada Enterprises, d/b/a View Heights Convalescent Hospital, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 21, issue a complaint on September 3, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended.[1] Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on July 10, 1980, following a Board election in Case 21-RC-16219, the Union was duly

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[1]On September 3, 1980, the Regional Director for Region 21 issued a consolidated amended complaint and an order consolidating Cases 21-CA-19373, the instant case, and 21-CA-18554, which alleges violations of Sec. 8(a)(4), (3), and (1) of the Act. Respondent's answer specifically denied allegations relating to Case 21-CA-18554. Thereafter, on November 18, 1980, pursuant to a withdrawal request by Charging Party-Union, the Regional Director for Region 21 severed the above-numbered two cases and dismissed the charges related to Case 21-CA-18554.

certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[2] and that, commencing on or about July 25, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On September 10, 1980, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On December 29, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on January 8, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause.[3]

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and opposition to the General Counsel's Motion for Summary Judgment, Respondent neither admits nor denies the procedural allegations, the status of the Union as a labor organization, the appropriateness of the unit, that an election was conducted among

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[2]Official notice is taken of the record in the representation proceeding, Case 21-RC-16219, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir.1968); Sec. 9(d) of the NLRA, as amended.

[3]The response is entitled "Statement in Opposition to General Counsel's Motion for Summary Judgment."

certain of its employees, that a majority cast ballots in favor of representation by the Union, that subsequently the Board issued a Certification of Representative, the Union's post-certification request for bargaining, or its refusal to bargain with the Union. Therefore, under Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, which states, "any allegation in the complaint not specifically denied or explained . . . shall be deemed to be admitted to be true . . .," we find that Respondent has admitted those allegations. However, Respondent denies that the Union has been and is now the exclusive representative of the employees in the stipulated unit for the purposes of collective bargaining and asserts as its sole affirmative defense that the Board incorrectly certified the Union by improperly overruling Respondent's objections to the election.

Review of the record herein reveals that in Case 21-RC-16219 Respondent filed objections to the conduct of the election[4] alleging, *inter alia*, that the Union's authorization cards contained a statement which violated the rule set forth in *N.L.R.B. v. Savair Manufacturing Company*, 414 U.S. 270 (1973). Respondent contended that the card's instruction to "[f]ill out and sign the authorization card . . . You will not be charged any initiation fee" implied that only those employees signing the cards would be exempt from paying the fee. The Regional Director's investigation disclosed that the card did not state or imply that the initiation fee waiver was applicable only to card signers. The investigation also revealed that the Union's campaign leaflets clearly stated that the waiver of the membership initiation

[4]The election was held pursuant to a Stipulation for Certification Upon Consent Election. The tally of ballots revealed that of approximately 97 eligible voters, 36 voted for, and 30 voted against, the Union; there were 5 challenged ballots, an insufficient number to affect the results.

fee was not dependent on an employee's manifestation of support for the Union prior to the election. The Regional Director overruled the objection and Respondent excepted to his report. The Board considered Respondent's exceptions, and on July 10, 1980, affirmed the Regional Director's findings and certified the Union.

Thereafter, in reply to the Union's request for bargaining, Respondent asserted that the certification of the Union was incorrectly issued. In its defense to the instant charge Respondent reasserts this same argument.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[5]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

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[5]See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

Findings of Fact

I.

The Business of Respondent

Respondent, a California corporation and health care institution, is engaged in the business of providing convalescent and mental care to its patients and operates a facility located at 12619 South Avalon Boulevard, Los Angeles, California. In the normal course and conduct of its business operations described above, Respondent, during the last 12-month period, derived gross revenues in excess of $250,000 and, during the same period of time, purchased and received goods and products valued in excess of $5,000 from outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II.

The Labor Organization Involved

Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III.

The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees employed by the Respondent at its facility located at 12619 South Avalon Boulevard Los Angeles, California, but excluding professional em-

ployees, registered nurses, office clerical employees, guards, and supervisors as defined in the Act.

2. The certification

On February 26, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 21, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on July 10, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about July 21, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about July 25, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since July 25, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV.

The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described

in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V.

The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Amada Enterprises, d/b/a View Heights Convalescent Hospital, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO,is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by Respondent at its facility located at 12619 South Avalon Boulevard, Los Angeles, California, but excluding professional employees, registered nurses, office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since July 10, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about July 25, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Amada Enterprises, d/b/a View Heights Convalescent Hospital, Los Angeles, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees employed by the Respondent at its facility located at 12619 South Avalon Boulevard, Los Angeles, California, but excluding professional employees, registered nurses, office clerical employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its South Avalon Boulevard, Los Angeles, California, facility copies of the attached notice marked

"Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. March 19, 1981.

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[6]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government.

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All employees employed at the 12619 South Avalon Boulevard, Los Angeles, California facility, but excluding professional employees, registered nurses, office clerical employees, guards, and supervisors as defined in the Act.

AMADA ENTERPRISES, d/b/a/ VIEW HEIGHTS CONVALESCENT HOSPITAL

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, City National Bank Building, 24th Floor, 606 South Olive Street, Los Angeles, California 90014, Telephone 213-688-5229.

APPENDIX D

Decision and Order.

United States of America Before the National Labor Relations Board.

B and E Convalescent Centers, Inc. and Convalescent Employers Service, Inc. d/b/a Gardena Convalescent Center, and Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO. Case 31-CA-10915.

257 NLRB No. 25.

Upon a charge filed on March 4, 1981, by Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO, herein called the Union, and duly served on B and E Convalescent Centers, Inc. and Convalescent Employers Service, Inc. d/b/a Gardena Convalescent Center, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 31, issued a complaint and notice of hearing on March 17, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on January 26, 1981, following a Board election in Case 31-RC-4862,[1] the Union was duly

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[1]Official notice is taken of the record in the representation proceeding, Case 31-RC-4862, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir.1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about February 17, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On March 25, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On April 20, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on May 7, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its response to the Motion for Summary Judgment, Respondent denies the validity of the Union's certification on the ground that the Board erred by overruling its objections to the election held in Case 31-RC-4862. Counsel for the General Counsel contends that Respondent is raising issues which were considered and resolved in the representation case, and that this it may not do. We agree.

The election in Case 31-RC-4862 was conducted on October 28, 1980, pursuant to a Stipulation for Certification Upon Consent Election. The tally of ballots shows that of approximately 40 eligible voters, 20 cast ballots for, and 19 against, the Union; there were no challenged ballots. Thereafter, Respondent filed timely objections to conduct

affecting the results of the election. On December 11, 1980, the Acting Regional Director issued and served upon the parties his Report on Objections in which he recommended overruling Respondent's objections and certifying the Union. After Respondent filed exceptions to the Acting Regional Director's report, the Board issued its Decision and Certification of Representative on January 26, 1981,[2] in which it adopted the Acting Regional Director's recommendations to overrule Respondent's objections and, thus, certified the Union as the exclusive bargaining representative of Respondent's employees in the appropriate unit.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.[4]

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[2]Not reported in volumes of Board Decisions.

[3]See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[4]Although Member Zimmerman did not participate in the underlying representation proceeding, he considers the Board bound to grant summary judgment without regard to the merits of the issue Respondent now attempts to relitigate. See *Bravos Oldsmobile*, 254 NLRB No. 135 (1981).

Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I.

The Business of Respondent

B and E Convalescent Centers, Inc. and Convalescent Employers Service, Inc. d/b/a Gardena Convalescent Center, a California corporation with an office and place of business in Gardena, California, is engaged in the operation of a convalescent hospital. In the course and conduct of its business operations, Respondent annually derives gross revenues in excess of $100,000, and annually purchases and receives at its Gardena, California, facility goods or services valued in excess of $5,000 directly from suppliers located outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II.

The Labor Organization Involved

Hospital and Services Employees Union, Local 399, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III.

The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees employed by the Employer at its facility located at 14819 South Vermont Avenue, Gardena, California, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On October 28, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 31, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on January 26, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about February 4, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about February 17, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since February 17, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair

labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV.

The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V.

The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. B and E Convalescent Centers, Inc. and Convalescent Employers Service, Inc. d/b/a Gardena Convalescent Center, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by the Employer at its facility located at 14819 South Vermont Avenue, Gardena, California, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since January 26, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about February 17, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise

of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, B and E Convalescent Centers Inc. and Convalescent Employers Service, Inc. d/b/a Gardena Convalescent Center, Gardena, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees employed by the Employer at its facility located at 14819 South Vermont Avenue, Gardena, California, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay,

wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facility in Gardena, California, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. July 27, 1981.

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the Notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government.

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All employees employed by the Employer at its facility located at 14819 South Vermont Avenue, Gardena, California, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

B AND E CONVALESCENT CENTERS, INC. AND CONVALESCENT EMPLOYERS SERVICE, INC. d/b/a GARDENA CONVALESCENT CENTER

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Room 12100, Federal Building, 11000 Wilshire Boulevard, Los Angeles, California 90024, Telephone 213-824-7357.

APPENDIX E

Decision and Order.

United States of America Before the National Labor Relations Board.

Cheviot Garden Convalescent Hospital, Inc. d/b/a Cheviot Garden Convalescent Hospital and Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO. Case 31-CA-11196.

258 NLRB No. 177.

Upon a charge filed on June 4, 1981, by Hospital Service Employees Union, Local 399, Service Employees International Union, AFL-CIO, herein called the Union, and duly served on Cheviot Garden Convalescent Hospital, Inc. d/b/a Cheviot Garden Convalescent Hospital, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 31, issued a complaint on June 17, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on March 13, 1981, following a Board election in Case 31-RC-4893, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appro-

priate;[1] and that, commencing on or about March 22, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On June 30, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On August 4, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on August 12, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent filed a response to the General Counsel's Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent does not deny that it has refused to recognize, meet, and bargain with the Union but it contests the validity of the Board's certification

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[1]Official notice is taken of the record in the representation proceeding, Case 31-RC-4893, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1976), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

by denying that a majority of the employees in the appropriate unit have designated the Union as their collective-bargaining representative. To that end, Respondent alleges as an affirmative defense that the Union:

> . . . obtained authorization cards for a showing of interest by improperly promising to employees that an employee who signed the authorization card would not be charged an initiation fee. . . .

In its response to the General Counsel's motion for summary judgment, Respondent further argues that, for the reasons it had earlier raised in its exceptions to the Regional Director's report in the underlying representation proceeding, the election should have been set aside.

Our review of the record herein, including the record in Case 31-RC-4893, reveals that, on October 6, 1980, the Regional Director for Region 31 approved a Stipulation for Certification Upon Consent Election entered into by Respondent and the Union concerning the unit involved in this proceeding. Thereafter, on November 25, 1980, an election was conducted under the direction and supervision of the Regional Director for Region 31 among the employees in the unit found appropriate. The tally of ballots indicated that, of approximately 50 eligible voters, 19 cast ballots for, and 11 cast ballots against, the Union. There were six challenged ballots, an insufficient number to affect the results of the election.

Thereafter, on December 2, 1980, Respondent filed objections to the election in which it contended that the Union had "obtained authorization cards for a showing of interest by improperly promising to employees that an employee who signed the authorization card would not be charged initiation fees." On January 9, 1981, the Regional Director in a report on objections recommended overruling this objection and certifying the Union as the exclusive bargaining

representative of the employees in the unit found appropriate. The Regional Director concluded that the Union's solicitation of authorization cards did not run afoul of the Supreme Court's decision in *N.L.R.B. v. Savair Manufacturing Company*, 414 U.S. 270 (1973). Further, assuming *arguendo* any ambiguity in the Union's original statement, the Regional Director found that any such ambiguity was cured by later statements. Lastly, the Regional Director concluded that an analysis of all the surrounding circumstances indicated that employees were unambiguously informed that the initiation fees were waived in a manner consistent with *Savair*. On January 19, 1981, Respondent filed exceptions to the Regional Director's report. On March 13, 1981, the National Labor Relations Board issued a Decision and Certification of Representative, adopting the Regional Director's findings and recommendations and certifying the Union as the exclusive collective-bargaining representative of the employees in the appropriate bargaining unit.

As previously noted, Respondent, in its answer and in its response to the Motion for Summary Judgment, challenges the statements made by the Union in obtaining authorization cards for a showing of interest. This issue was considered and disposed of in the underlying representation proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

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[2]See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact[3]

I.

The Business of Respondent

Respondent is a California corporation with an office and principal place of business located in Los Angeles, California, where it is engaged in the operation of a nursing home. Respondent, in the course and conduct of its business operations, annually purchases and receives goods or services valued in excess of $5,000 directly from suppliers outside the State of California. Respondent, in the course and conduct of its business operations, annually derives gross revenues in excess of $100,000.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, and employer

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[3]With respect to secs. I, II, and III, A, 1 of the findings of fact set out below, Respondent's answer neither admitted nor denied the complaint allegations upon which these findings are based. Therefore, consistent with Sec. 102.20 of the Board's Rules and Regulations, the relevant complaint allegations are deemed admitted to be true. Similarly, with regard to secs. III, A, 2 and III, B below, Respondent's denial of the underlying complaint allegations runs only to the legal conclusions therein and not to the dates involved.

engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II.

The Labor Organization Involved

Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III.

The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees employed by the Employer at its 3533 Motor Avenue, Los Angeles, California location, excluding all professional employees, office clerical employees, guards, and supervisors as defined in the Act.

2. The certification

On November 25, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 31, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on March 13, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request to Bargain and Respondent's Refusal

Commencing on or about March 24, 1981, and at all times thereafter, the Union has requested Respondent to

bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about May 22, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since May 22, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV.

The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V.

The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understand-

ing is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a/ Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Cheviot Garden Convalescent Hospital, Inc. d/b/a/ Cheviot Garden Convalescent Hospital is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by the Employer at its 3533 Motor Avenue, Los Angeles, California location, excluding all professional employees, office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 99(b) of the Act.

4. Since March 13, 1981, the above-named labor organization has been and now is the certified and exclusive

representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about March 22, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Cheviot Garden Convalescent Hospital, Inc. d/b/a/ Cheviot Garden Convalescent Hospital, Los Angeles, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All employees employed by the Employer at its 3533 Motor Avenue, Los Angeles, California location, excluding all professional employees, office clerical employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facility in Los Angeles, California, copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[3]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. September 30, 1981.

John H. Fanning, Member

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government.

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All employees employed by the Employer at its 3533 Motor Avenue, Los Angeles, California location, excluding all professional employees, office clerical employees, guards, and supervisors as defined in the Act.

CHEVIOT GARDEN CONVALESCENT HOSPITAL, INC. d/b/a/ CHEVIOT GARDEN CONVALESCENT HOSPITAL

_____

(Employer)

Dates _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 11000 Wilshire Blvd., Room 12100, Los Angeles, California 90024, Telephone 213—824-7357.

APPENDIX F

DO YOU WANT HIGHER WAGES AND HEALTH AND WELFARE INSURANCE? DO YOU WANT SENIORITY RIGHTS AND JOB PROTECTION?

ARE YOU TIRED OF UNREASONABLY LOW WAGES?

Fill out and sign the authorization card printed below. Drop it in the mail. No postage necessary. This card is strictly confidential, and your employer will not know that you have signed. You will not be charged any initiation fee.

For further information, telephone (213) 680-9567, or contact us at 1247 West 7th Street, Los Angeles, California 90017.

HOSPITAL AND SERVICE EMPLOYEES
UNION LOCAL 399, AFL-CIO
Authorization as Union Bargaining Agent

I authorize the Hospital and Service Employees Union, Local 399, AFL-CIO to represent me for purposes of collective bargaining with my employer, and the Union may request recognition and bargain on my behalf with my employer on wages, fringe benefits and working conditions.

Date _____ SIGNATURE _____

PLEASE PRINT

Name _____ Phone _____

Home Address _____

City _____ Zip Code _____

Name of Employer _____

Date Hired ____ Shift ____ Soc. Sec. No. _____

Work Location _____ Classification _____

APPENDIX G

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 USCS § 157];

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [29 USCS §159(a)].

* * *

§ 159. Representatives and elections

* * *

(c) **Hearings on questions affecting commerce — Rules and regulations.** (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board —

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsec. (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsec. (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him

a claim to be recognized as the representative defined in section 9(a) [subsec. (a) of this section];
the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [29 USCS § 160(c)].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [29 USCS §§ 151-158, 159-168] in any election conducted within twleve months after the commencement of the strike. In any election where none of the choices on the ballots receives a majority, a runoff shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.